91-1540

Supreme Court, U.S.
FILED
MAR 20 1992
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

IN RE WAYNE SHUMA AND AMELIO GALLO, D/B/A PLAZA VENDING CO. AND PLAZA VENDING FAMILY FUN AND GAMES,

Petitioner,

vs.

K. LAWRENCE KEMP, TRUSTEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Allen N. Brunwasser
Attorney for Petitioner
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Pittsburgh, PA 15222
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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. IF DISTRICT COURT JURISDICTION TO ENTERTAIN AN APPEAL FROM A BANKRUPTCY COURT IS RAISED FOR THE FIRST TIME IN APPELLEE'S CIRCUIT COURT BRIEF, SHOULD THE CIRCUIT COURT DISMISS THE APPEALS FOR LACK OF DISTRICT COURT AND/OR ITS OWN JURISDICTION WITHOUT FIRST GIVING APPELLANT AN OPPORTUNITY TO ARGUE THE ISSUE?

II. ASSUMING, ARGUENDO, THAT ALL ORDERS ON APPEAL FROM THE BANKRUPTCY COURT ARE INTERLOCUTORY, DOES A COURT OF APPEALS HAVE JURISDICTION TO ENTERTAIN APPEALS FROM THE DISTRICT COURT WHEN THE DISTRICT COURT DISMISSES THE APPEALS FOR NON-INTERLOCUTORY REASONS AND AFTER THE APPEALED ISSUES HAD BEEN PRESENTED?

III. SHOULD THIS CASE AWAIT DECISION IN GERMAIN V. THE CONNECTICUT MUTUAL BANK, OCTOBER 15, 1991, NO. 90-1781?

IV. IF APPELLEE RAISED LATE FILING OF AN APPEAL FROM A BANKRUPTCY COURT TO A DISTRICT COURT FOR THE FIRST TIME IN HIS CIRCUIT COURT BRIEF, SHOULD APPELLANT BE FIRST GIVEN AN OPPORTUNITY TO PROVE THE APPEAL WAS TIMELY FILED BEFORE THE CIRCUIT COURT DISMISSES IT AS FILED LATE?

LIST OF PARTIES

The Petitioners are Wayne Shuma and Amelio Gallo, d/b/a Plaza Vending Co. and Plaza Vending Family Fun and Games. The Respondent is K. Lawrence Kemp, Trustee.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The United States Court of Appeals filed no opinion. Its orders have been reproduced in the Appendix. (1-A to 3-A - orders of November 25, 1991; December 27, 1991 order denying rehearing (4-A to 5-A). The March 14, 1991 opinion of Bankruptcy Judge Bernard Markovitz is reported at 124 B.R. 668.

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STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered in the United States Court of Appeals for the Third Circuit on November 25, 1991. Rehearing was denied on December 27, 1991. The jurisdiction of the United States Supreme Court to grant certiorari is founded upon 28 USC 1254(1).

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CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Fifth Amendment to United States Constitution, "No person shall be deprived of life, liberty, or property, without due process of law -"

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CONCISE STATEMENT OF THE CASE CONCERNING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

This case involves two petitions to put Petitioners into involuntary Chapter 7 Bankruptcy in the Bankruptcy Court in the Western District of Pennsylvania at No. 83-0889-M and No. 84-1820-M.

Petitioners appealed various adverse to them decisions to the United States District Court for the Western District of Pennsylvania where the cases were numbered

C.A. 90-135, C.A. 90-154 and C.A. 90-439. Jurisdiction of the District Court is provided by 28 USC 1334 which directs "the District Courts shall have original jurisdiction, exclusive of the states, of all matters and proceedings in bankruptcy.

The court's clerk assigned the cases to District Judges Donald E. Ziegler and Gustave Diamond.

At no time did Respondent or either judge raise any question about the appealed orders being interlocutory and the merits of the issues on appeal were litigated.

However, all appeals were dismissed for other technical reasons, and Petitioners filed timely appeals to the United States Court of Appeals for the Third Circuit at Nos. 91-2370, 91-3271 and 91-3349.

On May 10, 1991, after oral argument, Senior Third Circuit Judge Joseph F. Weis, Jr., granted a stay subject to reconsideration by a court panel.

On June 3, 1991, a panel composed of Circuit Judges Stapleton, Hutchinson and Alito, continued the stay but directed the stay issue be treated "as a petition for a writ of prohibition and the clerk shall assign that petition to a merits panel." This element of the case became C.A. 91-3332.

After all four proceedings were consolidated by the clerk on June 3, 1991, a brief and a separate appendix for the three appeals and the petition for writ of prohibition were filed and served by Petitioners.

For the first time, Respondent, in his brief, argued that the appeals were

interlocutory and the appeal from the Bankruptcy Court to the District Court was filed too late at C.A. 90-135, which was No. 91-3349 in the Court of Appeals. He also said the appeal in that case from the District Court to the Circuit Court was late (pages 1-3).

Respondent Trustee, for the first time, also argued that C.A. 90-154 (No. 91-3270 in the Circuit Court) was interlocutory and also might be untimely (pages 3-4), and that C.A. 90-439 (No. 91-3271 in the Court of Appeals) was interlocutory (pages 4-5).

For his untimely argument, Respondent relied only upon Re Abdallah, C.A. 1, 1985, 778 F2d 75, cert. denied, 476 US 1116 (1986) and on the interlocutory issue solely on Re Gracy, 80 B.R. 675, E.D. Pa., 1987, affirmed without opinion in a

memorandum decision in the then non-precedental tables at C.A. 3, 1989, 849 F2d 601, cert. denied, 488 US 880 (1989) and Re Johns-Manville Corp., 1985, S.D.N.Y., 47 B.R. 957.

Although the above material appeared in Respondent's "Statement of Appellate Jurisdiction" (pages 1-5), it was not mentioned in his "Counter Statement of the Issues" (page 6) or argued in his "Argument" (pages 14-18). He did state in his "Conclusion" (page 17) "- all the bankruptcy orders that generated these appeals were interlocutory."

On July 19, 1991, the Circuit Court advised the appeals would be decided on August 13, 1991 on the briefs filed by provision of Circuit Rule 12(6) by a panel composed of Circuit Judges Cowen, Nygaard and District Judge Pollak. However, on

September 3, 1991, Circuit Judge Robert E. Cowen, also speaking for new panel Circuit Judge Members Mansmann and Roth, advised the decision would be made November 18, 1991 "on the briefs pursuant to Third Circuit Rule 12(6)."

This rule controls the privilege of oral argument and how the decision to grant it is made. It first advises: "Experience discloses that judges usually vote to eliminate oral argument" and then goes on to explain, in relevant part, when it will be denied:

"Where the issue is tightly constrained, not novel, and the briefs adequately cover the arguments" (121(6) 3a(a)).

"Where the outcome of the appeal is clearly controlled by a decision of the

Supreme Court or this Court" (12(6) 3a(4)).

The said rule then goes on to explain (12(6) 3b) that "Experience discloses that judges usually vote for oral argument:

"(1) Where the appeal presents a substantial and novel legal issue" and

"(2) Where the appeal presents one or more issues, the resolution of which will be of institutional or precedental value" and

"(3) Where a judge has questions to ask counsel, the answers to which will clarify an important legal, factual or procedural point" (emphasis supplied).

On November 25, 1991, the panel, speaking through Circuit Judge Cowen, dismissed all three appeals. It said: "After considering the contentions raised

by appellants, and this court concluding that it has no jurisdiction, See In Re Abdallah, 778 F2d 75 (1st Cir. 1985, cert. denied, 476 US 1116 (1986); In Re Gracey, 80 B.R. 675 (E.D. Pa. 1987), Aff'd w/o Opinion, 849 F2d 1601 (3d Cir. 1988), cert. denied, 488 US 950 (1989); it is:

ADJUDGED AND ORDERED that the appeal be and is hereby dismissed. Costs taxed against appellants" (1-A to 2-A).

In the prohibition case (No. 91-3332), the panel, again speaking through Circuit Judge Cowen, said: "After considering the contentions raised by petitioners; it is

ADJUDGED AND ORDERED that the Petition for Writ of Prohibition be and is hereby denied" (3-A).

Petitioner then filed and served a timely "Motion for Panel Hearing and Suggestion of Rehearing in banc" (9a-28a). On December 27, 1991, this motion was denied (7a). On or about January 31, 1992, Petitioners filed a "Motion to Reconsider Order of January 21, 1992, in light of subsequent events and to toll period in which certiorari petition must be presented to U.S. Supreme Court" (24a-31a). On the 13th day of February, this motion was denied. The January 21, 1992 order had refused to return the mandate.

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REASONS FOR ALLOWANCE OF THE WRIT

Petitioners argued what has become questions I, II and IV in their rejected by the Court of Appeals motion for rehearing (9a-28a). They incorporate that

material here in urging the writ of certiorari be granted.

The record in this case clearly discloses that no lower court or respondent ever indicated Petitioners had filed any appeal from the Bankruptcy Court late or that any issue in the District Court was interlocutory.

If they had, a factual record could have been made at an evidentiary hearing which Petitioners would have then and there requested and briefs and argument could have been supplied to aid a learned decision.

Instead, Appellee-Respondent, as pointed out above, raised these issues in his appeal brief for the first time and the Court of Appeals agreed without granting Petitioners an opportunity to speak to the new problem (2a-3a).

Petitioners respectfully suggest that if these new issues (which required dehors record development of new facts) were to be considered, oral argument under circuit Rule 12(6), detailed above, should have been allowed so counsel could at least be questioned by the panel and an informed decision made whether a remand to develop additional facts and supply new case law was necessary or advisable.

Any argument that this was cured by Petitioner's Motion for Reargument (7a to 28a) neglects the issue of allocation of burden of proof. Respondent would be the moving party if Petitioner had to resist his motion whereas Petitioners had the burden of proof to convince the Court of Appeals that the panel was wrong, after the November 25, 1991 decision was made. Armstrong v. Manzo, 1965, 380 US 545, 551,

85 S.Ct. 1187, 1191, and without an opportunity to factually prove it.

Petitioners' research has disclosed that this Court, the U.S. Court of Appeals for the Third Circuit and for the 11th, 1st, 7th, 2nd and 6th Circuits require an opportunity to respond before a case is dismissed for lack of jurisdiction or because of an opposite party challenge.

Lankford v. Idaho, May 20, 1991, ___ US ___, 111 S.Ct. 1723, 1733, N. 22, reversed a sentence of death when no presentence notice that it might be imposed was given. ("In a variety of contexts, our cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn").

After declaring what happened, a due process violation, Armstrong v. Manzo, was cited in re requiring notice before the decision and advising an after decision opportunity to argue the ruling be revoked was insufficient as this reversed the burden of proof. See also Carey v. Piphus, 1978, 98 S.Ct. 1042, 1051, 435 US 247, 261-262 (decision without prior opportunity to be heard violates due process even if same decision would be made after opportunity given).

In Berandi v. Swanson Memorial Lodge, etc., 1990, C.A. 3, 920 F2d 198, 200, a judge of the Pennsylvania District Court was reversed by the Third Circuit Court of Appeals because he dismissed a case for lack of jurisdiction without first giving the losing party an opportunity to meet the issue.

Five other circuit appeals courts have taken the same position. Square D Co. v. Niagra Frontier Tariff Bureau, C.A. 2, 1985, 760 F2d 1347, 1365, affirmed 476 US 409, 414, 106 S.Ct. 1922, 1925 ("Failure to afford an opportunity to address the court's sua sponte motion to dismiss is, by itself, grounds for reversal"); Chalwest Limited v. Ellis, 1991, C.A. 11, 924 F2d 1011, 1014 and N. 3 at page 1013 (issue of personal jurisdiction requires hearing to resolve the facts); Colonial Pipeline Co. v. Collins, 1991, C.A. 11, 921 F2d 1237, 1243 ("A plaintiff must have ample opportunity to present evidence bearing on the existence of jurisdiction"), and Preterm, Inc. v. Dukakis, 1979, C.A. 1, 591 F2d 121, 134 (issue of standing dismissal reversed - "Although a court may dismiss an action at its own instance, as apparently happened

here, it must first afford the parties an opportunity to oppose the dismissal"); Shockley v. Jones, 1987, C.A. 7, 823 F2d 1068, 1073 and N. 3, citing similar courts of appeal in five circuits (case dismissed for lack of subject matter jurisdiction and failure to state claim affirmed as remand futile - "Thus, even where the dismissal is on jurisdictional grounds, unless the defect is clearly incurable, a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue, or provide the plaintiff with the opportunity to discover the facts necessary to establish jurisdiction").; Franklin v. State of Oregon, State Welfare Division, 1981, C.A. 6, 662 F2d 1337, 1340-1341 (Prisoner's suit dismissed before summons served because it did not support a claim; reversed; court must first "notify the plaintiff of the

proposed action and afford him an opportunity to submit written argument in opposition" or "to amend" so court does not appear to be "a proponent rather than an independent entity").

Petitioners thus respectfully suggest the circumstances of the November 25, 1991 order (2a) deprived them of Fifth Amendment due process and was also contrary to established pre-decision established procedure. Since this is certainly a matter of great public interest, and this decision overrules accepted case law, they urge this highest court to grant the writ and then reverse.

Petitioners also respectfully suggest the interlocutory issue decision will be aided if the pending Germain issue of Question III is ended by reversal of the second Circuit Court of Appeals and

approval of what the Third Circuit Court of Appeals previously ruled.

As recently as December 5, 1991, the U.S. Court of Appeals for the Third Circuit has indicated even its own judges are not in agreement on what is a final bankruptcy order. In Re BH and P, Inc., December 5, 1991, C.A. 3, 949 F2d 1300, 1306 (opinion of Circuit Judge Mansmann) observed "finality in a more pragmatic and less technical way in bankruptcy cases than in other situations" and "to avoid the waste of time and resources" of awaiting the case ending "courts have permitted appellate review of orders that in other contexts might be considered interlocutory."

Circuit Judge Hutchinson (949 F2d at 1318) appears to personally disagree but goes along due to internal operating Rule

9.1 and contrasts the finality rule of 11 USC 158(d) with the interlocutory grace option of 11 USC 158(a) (page 1320, N. 3).

The case involved removal of a trustee and his counsel, an issue usually held interlocutory. (See N.1, page 1319 as to counsel).

Petitioners respectfully request the writ be allowed on the interlocutory issue as a decision by this motion's highest court will certainly be of great public and professional interest and make the practice of law more efficient for courts and lawyers who do not want to risk loss of appeal rights by not appealing or appeal when to do so is improper.

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CONCLUSION

The writ should be granted.

Respectfully submitted,

Allen N. Brunwasser
Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3270

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Appellants

On Appeal
from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 90-00154)
District Judge: Hon. Donald E. Ziegler

No. 91-3271

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Appellants

On Appeal
from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 90-00439)

App. 2

District Judge: Hon. Donald E. Ziegler

No. 91-3349

IN RE: WAYNE SHUMA
t/d/b/a AMELIO GALLO,

Wayne Shuma and
Amelio Gallo,

Appellants

On Appeal from
the United States District of Pennsylvania
(D.C. Civil No. 90-00135)
District Judge: Hon. Gustave Diamond

Submitted Under Third Circuit Rule 12(6)
November 18, 1991

Before: MANSMANN, COWEN and ROTH
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellants, and this Court concluding that it has no jurisdiction, see In Re Abdallah, 778 F.2d 75 (1st Cir.

1985), cert. denied, 476 U.S. 1116 (1986); In Re Gracey, 80 B.R. 675 (E.D. Pa. 1987), aff'd w/o opinion, 849 F.2d 601 (3rd Cir. 1988), cert. denied, 488 U.S. 950 (1989); it is

ADJUDGED AND ORDERED that the appeal be and is hereby dismissed. Costs taxed against appellants.

ATTEST: By the Court,

Sally Mrvos, Clerk Robert E. Cowen
Dated: 11/25/91 Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3332

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Petitioners

On Appeal
from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 90-00439)
District Judge: Hon. Donald E. Ziegler

Submitted Under Third Circuit Rule 12(6)
November 18, 1991

Before: MANSMANN, COWEN and ROTH,
Circuit Judges

ORDER

After considering the contentions raised by petitioners; it is

ADJUDGED AND ORDERED that the Petition for a Writ of Prohibition be and is hereby denied.

ATTEST: By the Court,

Sally Mrvos, Clerk
Dated: 11/25/91

Robert E. Cowen
Circuit Judge

App. 6

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3270

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Appellants

No. 91-3271

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Appellants

No. 91-3332

IN RE: WAYNE SHUMA and AMELIO GALLO,
d/b/a PLAZA VENDING CO. and
PLAZA VENDING FAMILY FUN AND GAMES,

Wayne Shuma, Amelio Gallo
and Allen N. Brunwasser,

Petitioners

No. 91-3349

IN RE: WAYNE SHUMA
t/d/b/a AMELIO GALLO,

Wayne Shuma and
Amelio Gallo,

Appellants

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge; BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, Circuit Judges

The petition for rehearing filed by appellants/petitioners in the above-entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Robert E. Cowen
Circuit Judge

Dated: Dec. 27, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 91-3349, 91-3270, 91-3271, 91-3332

IN RE WAYNE SHUMA AND
AMELIO GALLO, d/b/a PLAZA
VENDING CO. AND PLAZA VENDING
FAMILY FUN AND GAMES

MOTION FOR PANEL REHEARING AND
SUGGESTION OF REHEARING IN BANC

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Certification of Service

On the 6th day of December, 1991,

copy mailed to K. Lawrence Kemp, Esquire.

Allen N. Brunwasser

To the Honorable, the Chief Judge and the Associate Judges of the United States Court of Appeals for the Third Circuit:

Wayne Shuma and Amelio Gallo respectfully aver:

1. On November 25, 1991, a panel of this high Court (Mansmann, Cowen and Roth, Circuit Judges) entered judgment orders dismissing these cases because it lacked jurisdiction due to an untimely appeal and because the orders were interlocutory. The orders are attached.

2. Appellants respectfully suggest the panel made the following errors of fact and law.

THE APPEAL FROM THE DECEMBER 5, 1989 ORDER OF THE BANKRUPTCY COURT WAS NOT LATE SO THIS COURT DOES HAVE JURISDICTION

A. Docket entry #77 clearly discloses that the order of December 5, 1989 was not docketed until December 7, 1989.

(1) At bankruptcy number 83-889, the entry says "Hrg. held on 89-7222M.

O/E that debtors are to file full and correct Sch w/i 60 days. Order signed 12/5/89 EOD 12/7/89. 11C.M.: Kemp, Finkel, Brunwasser" A photo of he page on which this entry appears is attached. It has been circled and arrowed for easy identification and also appears at page 25 of appellees Brief filed in Nos. 91-3270, 91-3271 and 91-3349.

(2) The same entry appears in Joined Case Bankruptcy Number 84-1820 a photo of which is also attached. The unnumbered entry is circled and arrowed.

(3) A photo of Bankruptcy D.E. 77 in No. 83-889 also appears in appellants' No. 91-3332 appendix at 151a. and a photo of the No. 84-1820 entry appears at 158a.

B. Appellants are not certain when

their counsel received a copy of the December 7, 1989 docketed order. However, on December 14, 1989, they mailed a notice of appeal to the clerk of the Bankruptcy court and also mailed a copy of the Notice of Appeal to appellee Kemp.

C. As can be observed from the attached Calendar, December 14, 1989 was a Thursday so the notice should have arrived at the Bankruptcy Clerk's office on or before the last day for filing which was December 18, 1989. (a Monday). It was mailed from downtown Pittsburgh and the Clerk's office is in Pittsburgh.

D. As can be seen from the attached Clerk's receipt, the appeal was not docketed until 9:20 A.M. on December 19, 1989.

(1) Appellants believe the appeal notice was received before December 19, 1989 and now ask for a remand for

an evidentiary hearing as to when the Notice of Appeal was <u>received</u> as distinguished from when it was entered in the docket by a clerk.

(2) Appellants respectfully suggest that if the said notice was not received in the mailroom of the District Court until December 19, 1989 that it could not have been sorted, delivered, read, evaluated and entered in the docket and a receipt made out by 9:20 A.M. - 20 minutes after the Clerk's office opened.

(3) Appellant's counsel has observed that mail from him to the clerk and from clerk to him takes one day so his notice should have arrived at the U.S. Courthouse on December 15, 1989 and believes it arrived <u>before</u> it was docketed on a date previous to

December 19, 1989 and requests a remand to prove it if he can.

E. If the notice was late and the ten day appeal time had run, the Clerk would have rejected it. If Mr. Kemp who is based in New Kensington had not received his copy until December 19, 1989, one day late, appellants respectfully suggest this experienced bankruptcy attorney (114a-119a) would have swiftly moved to quash it as he has often moved to punish appellants for other alleged defects in this litigation.

F. If any question about the timeliness of this appeal had been raised by the clerk or Trustee Kemp, appellants would have promptly requested Bankruptcy Rule 9006(b)(1)(2) and/or 8002(c) relief.

G. The above described appeal eventually became No. 91-3349 in this high Court and it was not until appellee Kemp

filed his Brief, received July 31, 1991, that this problem was raised for the first time. See attorney Kemp's Brief, mailed July 30, 1991, pages 1-2.

ARGUMENT ON THIS ISSUE

H. Bankruptcy Rule 9021 directs, inter alia, "A Judgment is effective when entered as provided in rule 5003". Rule 5003 advised inter alia, "the entry of a judgment or order in a docket shall show the date the entry is made." The Clausen Co. v. Dynathon Bondo Corp., 1989, C.A. 3, 889 F.2d 459, 464 C.D. 110 S.Ct 2174 agrees.

I. The United States Court of appeals has clearly ruled that the date an appeal is filed is when it is received - not when the Clerk gets around to making a docket entry. U.S. v. Solly, 1976, C.A. 3, 545 F.2d 874, 876, U.S. v. Giana, 1989 C.A. 3, 864 F.2d 313, 315 which approves

SOLLY, Gould v. The Members of the N.Y. Division of Water Policy and Supply, 1977, C.A. 3, 555 F.2d 340, 341, also approving Solly and remanding for an evidentiary hearing as to when the notice of appeal was received.

J. Matter of Pigge, 1976, C.A. 4, 539 F.2d 369 held that a December 27, 1974 mailing of an appeal from a December 17, 1974 order was timely even though not received until December 30, 1974, but observed (N3) that other circuits disagree.

K. Pigge and cases contra were all left undisturbed by Houston v. Lack, 1988, 487 U.S. at 274, 108 S.Ct. at 2384.

(1) Houston involved a prisoner's Habeas Corpus which arrived one day late.

(2) The Court of Appeals noticed the problem but issued a rule to show

cause in order to allow the prisoner to respond (appellants were not given that opportunity by this Court's November 25, 1991 Judgment Order and request it here plus a remand to develop relevant facts).

(3) The U.S. Supreme Court (108 S.Ct. at 2284) noticed that deposit in the mail is filing by specific provision of its rule 28.2 and that "filing" has never been defined and that the date of receipt of the notice, not when it is entered in the docket, control citing SOLLY. N.2 observes that the U.S. Supreme Court has never rejected "the mailbox rule".

(4) That highest Court also specu-lates on whether the early morning stamps by the clerk was evidence of Court post office receipt the day

before (N.3, page 2385). This is exactly what appellants argue here and request a remand to prove if they can.

(5) U.S. v. Grana, supra approves Houston (N.8, page 315).

L. If Judge Diamond, to whom this case was assigned, believed the appeal to his Court was late, appellants respectfully suggest he would have dismissed it as he did in the case of In Re Universal Minerals, Inc., 1985, C.A. 3, 755 F.2d 309, 311 where this court of appeals gave appellants an opportunity to respond to the alleged tardiness before ruling against them. He, sua sponte, moved against appellants here in re another issue (see appellant's Brief, question I, pages 7-14, 27-29, Question No. II, pages 29-37, Question No. III, pages 38 to 41).

M. Even if the appeal was late by

one day, appellant respectfully suggest it is still timely by specific provision of Bankruptcy rule 9006(f). This rule, which deals with enlargement of appeal time, directs in subsection (f), effective June 24, 1984, "where there is a right or requirement to do some act or undertake some proceeding within a prescribed period after service of a notice or other paper and the notice or other paper is served by mail, three days shall be added to the prescribed period".

Thus, the last day to file the appeal from the December 7, 1989 docketed order would be December 20, 1989.

O. Also Bankruptcy rule 9006(e) directs "service of process and service of any paper other than process or notice by mail is complete on Mailing".

P. Bankruptcy Rule 1 directs "these rules shall be construed to secure - the

just determination of every proceeding therein". Appellants respectfully urge the Court of Appeals to thus construe Rule 9006(b) to cover this issue and rule the appeal timely filed. Bankruptcy rules 5005, 9001 and 9002, which contain definitions, do not mention when an appeal is filed.

Q. Appellee only attacks the December 5, 1989 appeal. (see pages 17-18 of his Brief and also might have misled this Court by claiming the order was effective December 5, 1989 instead of December 7, 1989 (see page 2, line 17, Lines 21-22 "the order of the Bankruptcy Court entered December 5, 1989")

R. On page 2 of his Brief, Appellee discusses the subsequent issue of a late FRCP 59 Motion. Appellants response is contained in Question I of their Brief, pages 7-14. Abdullah, cited in the

November 25, 1991, Judgment order does not cover this issue of "Unique circumstances" so appellants have concluded it was not considered by the panel or whoever made the decision.

S. In re the appeal to the panel review provided by Rule 8011(e) (see appellee's Brief, page 3-4), another aspect of In re GRACY, relied upon in the November 25, 1991 Judgment order, holds an appeal to a nonexistent Bankruptcy panel does not destroy the appeal. In re GRACY, 79 B.R. 219, 221, N.7.

CONCLUSION

The Court of Appeals is respectfully asked to rule that the appeals were proper or, in the alternative, remand for an evidentiary hearing in re when the notice of appeal was received and what Judge Diamond's staff did to mislead appellants.

THE INTERLOCUTORY ISSUE

T. The Judgment Order cites only In re GRACY, 80 B.R. 675, aff'd w/o opinion 849 F.2d 601, C.A. 3, 1988, cert. denied, 488 U.S. 950, 1989, as authority for its finding the orders were all interlocutory.

(1) That case, which involved denial of a motion to operate schools, is non-precedential and should not have been relied upon here.

(2) U.S. v. Turley, 1989 C.A. 3, 891 F.2d 57, 60 advises, inter alia, that "-our internal operating procedures make clear that only published opinions of this court are regarded as precedential. Third Circuit I.O.P. ch. 5, sec. A.2".

(3) Even if this were not so, Gracey, contains language favorable to appellants here when it instructs (80 B.R. at 676=7) "Finality, however

is viewed more flexibly in the Bankruptcy context than it is in other civil litigation" In re Comer, 716 F.2d 168, 171 (3 d Cir. 1983) and then goes on to explain some of the factors considered.

(4) But Gracey went on to affirm on he merits (80 B.R. at 677-678) because the district court did not want to be "an overseer of the Bankruptcy Judge, a role we Loathe to accept".

U. In addition, both Judge Ziegler and Diamond accepted the appeals and decided issues and thus exercised their Bankruptcy rule 8001(b) right to sua sponte grant review of an interlocutory appeal, see In re Allegheny International, 1989, W.D. Pa., Judge Bloch, 107 B.R. 518, 522 which also explains the broader appeal aspects of the District and Court of

Appeals (N.2, page 521 citing Third Circuit Court of Appeals cases) and explains "the question of finality of Bankruptcy orders has been repeatedly pondered by the Third Circuit but the boundaries of finality remain amorphous" and (N. 2, page 521) "However, the same test for finality applies to the jurisdiction of District Courts to hear appeals from Bankruptcy Courts" See also In re F/S Airlines, II, Inc. (Judges Markovitz and Ziegler reversed) 1988, C.A. 3, 844 F.2d 99, 103, 104 (Bankruptcy orders held appealable when they would not be in other litigation, denial of counsel appealable, "and thus it appears that the district court and the parties treated the Bankruptcy Court's order as appealable").

V. In re Gianakas, 100 B.R. 787, affirmed, 1990 C.A. 3, 917 F.2d, 759, 760 held that the District Court (here Judge

Block) could take the interlocutory appeal sua sponte without motion and that the Third Circuit Court of Appeals could also "choose to exercise its discretion and consider this appeal sua sponte (emphasis in case Text) even if the order were not final". See 100 B.R. 787 in re sua sponte.

W. Appellants argue appealability in pages 1-2 of their Brief and their letter Brief (168a-169a) and in their #91-3332 Brief at pages 16-17 and pages 10-13 of their No. 91-3332 reply Brief and respectfully request this material be considered as part of this Motion.

X. A previous panel of this Court (Stapleton, Hutchinson and Alito, Circuit Judges) issued a June 3, 1991 Order (186a) converting part of this appeal to a request for a Writ of Prohibition. (186a at #91-3332 appendix). Those distin-

guished Judges did not quash the appeals for late filing or interlocutory defects and appellants respectfully suggest the present panel should not take a different approach.

Y. The December 5, 1989 Order was in the form of a mandatory injunction and Judge Markovitz attempted to enforce it by contempt. Thus, Hershey Foods Corp,v. Hershey Creamery Co., October 3, 1991, C.A. 3, 945 F.2d 1272 standards might apply.

CONCLUSION

The Orders are not interlocutory and Gracey is not authority for the Judgment Order.

THE ISSUE OF REOPENING THE MAY 28, 1985 ORDER OF JUDGE GIBSON

Z. The issue was presented to Judge Weis (pages 1a-4a, No. 91-3332, plus attachments which follow). It has been Briefed (pages 48-53 of 4 case Brief).

BEST AVAILABLE COPY

Appellants respectfully request this issue be decided or remanded to the District Court with an Order it be decided there. Otherwise it will remain in limbo forever.

CERTIFICATION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court of the Supreme Court in the cases cited in this Motion. The appeal involves a question of exceptional importance which is when an appeal from the Bankruptcy Court to the District Court is considered "filed". i.e., when

received or when docketed and whether the orders in this case, now presented for appeal, are interlocutory. Wherefore, panel reargument is requested and en banc review is suggested.

Respectfully submitted,

Allen N. Brunwasser
Attorney for Appellants

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 91-3270, 91-3271, 91-3332, 91-3349

IN RE WAYNE SHUMA AND
AMELIO GALLO, d/b/a
PLAZA VENDING CO. AND
PLAZA VENDING FAMILY
FUN AND GAMES,

MOTION TO RECONSIDER ORDER OF JANUARY 21, 1992, IN LIGHT OF SUBSEQUENT EVENTS AND TO TOLL PERIOD IN WHICH CERTIORARI PETITION MUST BE PRESENTED TO U.S. SUPREME COURT

1. Petitioners respectfully request this high Court's forgiveness for filing their additional motion, but believe it necessary in order to risk any claim they have waived in the issue presented.

2. On December 30, 1991, reargument was denied.

3. On or about January 17, 1992, in researching another case, Petitioners'

counsel noticed on Page 10 of the 132 B.R. #4 advance sheets that the U.S. Supreme Court had granted certiorari in Germain v. The Connecticut Mutual Bank, February 15, 1991, C.A. 2, 926 F2d 191 on the issue of whether a Court of Appeals had jurisdiction to review an appeal decided by the District Court when the Bankruptcy Court order was interlocutory. It said, "The Supreme Court has agreed to review the question of appellate jurisdiction over interlocutory bankruptcy appeals raised in Germain v. Connecticut National Bank, 926 F2d 191 (C.A. 2 - Conn. 1991)"

4. Counsel then read Germain, which said it could not, but observed the Third Circuit Court of Appeals had arrived at the opposite conclusion in Coastal Steel Corp. v. Tilgman Wheelabrator Ltd., 1983, C.A.3, 709 F2d 190, 200, N.7, C.D. 464 US 938, 104 S.Ct. 349.

5. Examination of Coastal confirmed that what was said in Germain was true.

6. The grant of certiorari in Germain also is published in 112 S.Ct. #5 advance sheets at VII and XIV.

7. Petitioners have had Coastal shepardized, and it has not been over-ruled.

8. They respectfully suggest the panel in their case might have overruled Coastal contrary to internal operating rules I.B. and IIA2.

9. That the expense of a printed petition for certiorari plus the $300 docket fee is a hardship Petitioners would prefer to avoid.

10. They thus respectfully request the panel consider amending the judgment holding the appeal interlocutory as permitted by internal operating rule Q6d in re whether it is interlocutory or, in

the alternative, recall the mandate and stay the period for requesting certiorari until the Supreme Court decides Germain.

Respectfully submitted,

_____

ALLEN N. BRUNWASSER
Attorney for Petitioners

CERTIFICATION OF SERVICE

On the 30th day of January, 1992, copy mailed to K. Lawrence Kemp, Esq., and hand delivered to Judge Donald E. Ziegler.

ALLEN N. BRUNWASSER